Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-168

Termar Navigation Company, Inc., As
Managing Owner of the SERAFIN TOPIC,
Petitioner,

versus

SS POLANICA, and against POLSKIE LINIE
OCEANICZNE, as Owner of the SS POLANICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976

No.

Termar Navigation Company, Inc., As Managing Owner of the SERAFIN TOPIC,
Petitioner,

versus

SS POLANICA And Polskie Linie Oceaniczne, As Owner of the SS POLANICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Termar Navigation Company, Inc., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on April 9, 1976.

OPINIONS BELOW

The findings, conclusions and interlocutory decree of the District Court for the Southern District of Alabama, entered on the 6th day of June, 1974; the order amending the findings of fact by the District Court entered on the 11th day of June, 1974; and the

order of the District Court of July 19, 1974, further amending the findings of fact and conclusions of law have not been reported. They are attached to this petition in the appendix at pages 1a-22a.

The opinion of the Court of Appeals for the Fifth Circuit of April 9, 1976, is reported in 529 F. 2d 1166 and is attached to this petition in the appendix at pages 25a-28a, and the judgment of that Court is attached at pages 23a-24a of the appendix.

The order of the Court of Appeals for the Fifth Circuit denying motion for rehearing, and motion for rehearing en banc of May 19, 1976 is reported in 532 F. 2d 1376, and letter from the Clerk of that Court, dated May 19, 1976, so advising, is attached to this petition in the appendix at pages 28a-29a.

JURISDICTION

a. The date of the judgment of the Circuit Court of Appeals for the Fifth Circuit sought to be reviewed is April 9, 1976, the date on which it was entered.

b. The date of the order of the United States Court of Appeals for the Fifth Circuit denying petition for rehearing and for rehearing en banc is May 19, 1976.

c. The jurisdiction of this Court to grant a writ of certiorari rests on Title 28, Sec. 1254 (1), U.S.C.

QUESTIONS PRESENTED

On April 16, 1973, the SERAFIN TOPIC was inbound in the Mobile Ship Channel. The POLANICA was outbound in that channel proceeding in the opposite direction. A maintenance dredge was at work on the eastern portion of the channel, a fact of which

both vessels were aware. Accordingly, they agreed, by radiotelephone, that the POLANICA would pass the dredge first (that they would not pass each other while passing the dredge), and both sounded one whistle signals.

That the agreement might be carried out, the SERAFIN TOPIC slowed, and the District Court found she commenced to drift across the centerline of the channel.

The POLANICA proceeded at full ahead or 13 knots until one minute before she passed the dredge when she reduced her engines to half ahead. On passing the dredge, she radioed the SERAFIN TOPIC to that effect.

According to the deck logs, including the deck bell book, which the District Court stated accurately reflected the movements of the POLANICA preceding the collision, the POLANICA's movements were as follows: 1857 half ahead; 1858 passed dredge; 1859 one whistle; 10 degrees starboard rudder; 1900 hard starboard; 1901 full astern, drop anchors; 1903 impact. The collision occurred after dark.

The Master, the Chief Officer and the pilot of the POLANICA all testified that the POLANICA did not respond to her starboard rudder order as she should. On the order "drop both anchors" only the port anchor was dropped.

Although the District Court found the POLANICA went hard starboard to go aground, realizing the SERAFIN TOPIC was not going to straighten out (F. 14, 8a-9a), the POLANICA did not then, or at any time

sound an alarm signal. She did not sound a full astern signal. She did not, by radio, advise of her hard starboard rudder order or of her full astern, drop both anchors orders. Her only radio communication, following her advice on passing the dredge, and before the collision, came in response to the pilot of the SERAFIN TOPIC's radio call just before the collision telling the POLANICA to put her rudder starboard as the POLANICA was turning to port.

The SERAFIN TOPIC sought, by discovery, to learn past history of the POLANICA's rudder problems and corrections, and objections to this discovery were sustained by the District Court.

The District Court found that the Mobile Ship Channel, in which this collision occurred, is not conducive to sheering. The SERAFIN TOPIC thereupon filed affidavits from numerous Mobile Bar Pilots who regularly navigate in the Mobile Ship Channel to the effect that each of them had experienced sheers in the Mobile Ship Channel, and knew of no other pilot who had not, and moved for a new trial. The affidavits were stricken, and the new trial denied.

In view of the foregoing, the following questions present themselves:

a. Were the POLANICA, and those in charge of her navigation, without fault in contributing to the collision with the SERAFIN TOPIC?

b. May a vessel violate statutory rules of the road designed to prevent collisions and avoid a finding of

fault without demonstrating that such violations did not contribute to a collision?

c. Are the Vessel Bridge-to-Bridge Radiotelephone Act, and the regulations promulgated pursuant to it, statutes designed to prevent collisions?

d. Were the SERAFIN TOPIC, and those in charge of her navigation, at sole fault in causing the collision with the POLANICA?

e. May the District Court deny a right of discovery into the steering problems of the POLANICA, and the correction of those problems, in an action arising out of a collision?

f. May the District Court strike affidavits of pilots of a harbor each of whose experience is in conflict with the findings of the District Judge, and thereupon, deny a new trial?

STATUTES AND REGULATIONS

The statutes, regulations and rules which the case involves are the following:

1. T. 28, U.S.C., Sec. 1254 (1): jurisdiction of this Honorable Court;

2. T. 28, U.S.C., Sec. 1333 (1): original jurisdiction of the District Court;

3. T. 33, U.S.C., Sec. 203, Rule III: the alarm or danger signal;

4. T. 33, U.S.C., Sec. 208: steam vessel's duty to slacken speed;

5. T. 33, U.S.C., Sec. 212: the special circumstances rule;

6. T. 33, U.S.C., Sec. 213: signal of full speed of engines astern;

7. T. 33, U.S.C., Sec. 221: usual additional precautions required generally;

8. T. 33, U.S.C., Sec. 1201, et seq. (Sections 1201 and 1204): the Vessel Bridge-to-Bridge Radiotelephone Act;

9. T. 33, C.F.R., Part 80, Sec. 80.27: speed of vessels passing floating plant;

10. T. 33, C.F.R., Part 26: Sec. 26.04 (b) and T. 47, C.F.R., Part 83, Sec. 83.251 (a) and (b): regulations implementing the Bridge-to-Bridge Radiotelephone Act;

11. Rule 26 (b) (1), of the Federal Rules of Civil Procedure: the rule of civil procedure governing discovery, generally.

All of the relevant portions of the foregoing statutes, regulations and rules are set out verbatim in appendix to this petition, at page 29a through 33a, in the order stated above.

STATEMENT OF THE CASE

A. The Case

The Court of Appeals has stated all of the facts in the case as follows:

> ". . . Termar Navigation Company, Inc., owner of the cargo vessel Serafin Topic, seeks reversal of the judgment of the court below, which found the Serafin Topic solely responsible for a collision with the cargo vessel SS Polanica. The accident occurred at about 7:00 p.m. on April 16, 1973 in the Mobile Ship Channel. Both vessels were under the direction of licensed Mobile Bar Pilots. The Polanica was proceeding south (outbound) and the Serafin Topic was heading north (inbound), when the vessels collided in the middle of the channel; the Polanica's bow struck the Serafin Topic a few feet aft of the plimsol mark (midship). There were no injuries, but both vessels sustained extensive damage. Termar Navigation brought suit against the Polanica, whose owner, Polski Linie Oceaniczne, counterclaimed. The case was tried on the liability issue only." . . . .

This statement is accurate, but incomplete. The matters set out below must also be considered.

The wind, on the night in question, was from 16 to 20 knots, blowing out of the east southeast. There was a southerly current of about one knot and the visibility was good. The collision occurred between beacons 32

and 34, nearer 32, after dark. The pilots on both vessels were equipped with radio equipment, commonly referred to as walkie-talkies, with which they communicated with each other both before and after the collision.

On the night of the collision, working in the dredged ship channel was the maintenance dredge DAVE BLACKBURN. This dredge was in a position between beacons 32 and 34, on the east side of the channel and was operating toward the south.

The Pilots on both vessels, aware of the fact that the dredge was at work in the channel, felt it undesirable that the vessels pass each other at, or too close to, the dredge. In recognition of this, there occurred an exchange by radio between the two Pilots as a result of which it was agreed that the POLANICA would pass the dredge first, followed by a normal port to port passage.

For the convenience of the Court, we are setting out below a table of comparative times between the two vessels, using all available factual material.

Using Engine Bell Books, Both Vessels

SERAFIN TOPIC		POLANICA	
Time	Event	Time	Event
1845	Half Ahead (from Full Ahead)	1847+	(At Full Ahead)
1846	Slow Ahead	1848+	
1851	Dead Slow Ahead	1853+	
1852	Stop	1854+	
1854+		1857	Half Ahead
1855	Dead Slow Ahead	1857+	

SERAFIN TOPIC		POLANICA	
Time	Event	Time	Event
1855+		1858	Passed Dredge
1856+		1859	One Whistle: 10° starboard rudder
1857		1859+	20° starboard rudder
1857+		1900	Hard Starboard
1858	Slow Ahead	1900+	
1858+		1901	Full Astern, drop anchor
1859	Full Ahead	1901+	
1859+	Impact	1902	Impact
1900	Full Astern	1902+	Stop
1900+	Full Ahead	1902+	Full Ahead
1900+		1903	Stop
1901	Stop	1903+	
1902	Slow Ahead	1904+	

Using Bridge Bell Books, Both Vessels

1845	Half Ahead	1849	(At Full Ahead)
1846	Slow Ahead	1850	
1850	Stop	1854	
1853		1857	Half Ahead
1854		1858	Passed Dredge
1855		1859	One Whistle: 10° starboard rudder
1855+		1859+	20° starboard rudder
1856	Dead Slow Ahead	1900	Hard Starboard
1857	Slow Ahead	1901	Full Astern, drop anchor
1858	Full Ahead	1902	
1859	Impact	1903	Impact
1859+		1903+	Full Ahead
1900		1904	Stop
1901	Stop	1905	

Note: The respective tables, shown above, reflect the differences in time as shown in the respective engine room bell and the bridge bell books of the two vessels. Partial minutes are shown by a plus (+). Other relevant information is inserted, chronologically, from other logs, and testimony.

There are discrepancies between the Bridge and Engine Bell Books of both vessels. Without explaining why, the District Court accepted both bridge bell books.

The POLANICA was going with her engines at half ahead at the time she passed the dredge. The District Court found (F. 26, 15a-16a) that the POLANICA was in the approximate center of the channel at the time she passed the dredge. As the POLANICA had reduced her engine speed from full ahead to half ahead only one minute before passing the dredge, she passed that dredge at a distance of less than 200 feet, and at a speed appreciably in excess of five miles per hour.

Both vessels sounded a one whistle signal; neither heard the other. At 1859 the POLANICA sounded her one whistle passing signal. This was the only signal given by the POLANICA before the collision. At the time she gave that one whistle signal, she executed an easy starboard rudder order. Based on the POLANICA's bridge bell book, the one whistle signal and the first starboard rudder execution occurred four minutes before the collision.

On the POLANICA, about thirty seconds after the "easy starboard" order, a further order of "more starboard" was given. To this the Helmsman of the POLANICA responded by giving 20 degrees on the rudder and so advised the pilot.

At 1900 the order was given "hard starboard". To this the Helmsman responded by placing the rudder to maximum to which the POLANICA's rudder goes. At 1901 the order was given "full astern, drop both

anchors". This was two minutes before the collision. Until the full astern, the engines of the POLANICA had been on half ahead.

In the foregoing statement of facts, the bell book and rough deck log of the POLANICA have been followed, logs which the District Court found fully portray the actions and maneuvers of the POLANICA until the time of collision. (F. 6, 3a-4a)

The District Court also found that the vessels were approximately 600 feet apart when the POLANICA executed another starboard order (F. 14, 8a-9a). This second starboard rudder order was before the hard starboard rudder order of 1900. At that time, the POLANICA, which had been going full ahead from 1847 to 1857, was at half ahead, and was moving at a speed of at least six knots, and as much as ten knots. At the same time, the SERAFIN TOPIC was moving in the opposite direction at a speed of approximately three knots (F. 15, 9a-10a). Thus, the combined speed of the vessels meant they were closing at not less than 900 feet a minute, and would have collided before 1901.

If the POLANICA was only 600 feet from the SERAFIN TOPIC when she gave her second starboard rudder order, followed by her hard starboard rudder order, and a minute or less from collision, she waited much too late to reverse her engines, and to give warning of the hazard she observed.

It was observed by the Pilot, the Master and the Chief Mate of the POLANICA that the POLANICA did not respond to the starboard rudder orders that were

given. In response to the order "drop both anchors" only the port anchor was dropped.

The POLANICA never sounded a "danger" signal, nor did she sound a "full astern" signal as required by statute. No radio communication was given to tell that the POLANICA was not responding to her rudder; or that she had gone hard starboard, or that she had ordered both anchors dropped; or that only her port anchor had been dropped; or that it was thought the SERAFIN TOPIC was crowding her or drifting into her course.

The District Court found the SERAFIN TOPIC slowed to a speed of three knots, and that the east southeast wind blowing against her starboard side tended to push her toward the western bank and into the path of the POLANICA. It also found that the SERAFIN TOPIC's pilot was concerned whether he was crowding the POLANICA. (In fact, he radioed the POLANICA to ask if he was crowding her; he received no answer.)

Although the Court makes no finding of the combined speed of the vessels at impact, the Court stated during the course of trial that the combined speed of the vessels at impact was about 11½ knots. (R. p. 1058).

With the POLANICA's engines on full astern, and an anchor dropped, she was rapidly losing speed at the time of impact. With the SERAFIN TOPIC's engines on full ahead, at the time of impact, she was rapidly gaining speed.

From the above recitation of facts, it becomes abundantly apparent that, on the POLANICA, those in charge of her navigation became aware of a danger of collision between 1859, when she made her first easy starboard movement, and 1900, when she went hard starboard. According to the findings of the District Court, this was between four minutes and three minutes before the collision.

Quite apparently, on the SERAFIN TOPIC, there was no awareness of this danger at that time. Those on the bridge of the SERAFIN TOPIC, which is at the stern of that vessel, had the vessel lined up with the dredge, directly ahead.

They were aware they must pass under the stern of the POLANICA and proceed toward the west, or their left side of the channel thereafter for the purpose of passing the dredge. Realizing the SERAFIN TOPIC had slowed appreciably to permit the POLANICA to pass the dredge, and being aware of the wind which was blowing, there was admitted concern that they might drift toward the west side of the channel, and the SERAFIN TOPIC's pilot in fact, by radio, inquired of the pilot of the POLANICA if he was crowding her, an inquiry which received no answer.

Despite the realization aboard the POLANICA that danger of collision existed at or before the time she went hard starboard at 1900, no effort was made by the POLANICA to communicate that concern to the SERAFIN TOPIC, either by radio or by the sounding of an alarm or danger signal;

Had the SERAFIN TOPIC been made aware of the danger of collision at 1900 (or even at 1901), the colli-

sion could easily have been avoided. If the SERAFIN TOPIC had gone full ahead at 1900, or 1901, she would have been well clear of the path of the POLANICA, as she was moving at a speed in excess of six knots an hour at the time of actual collision. An additional 30 seconds to a minute, on full ahead, would have taken the SERAFIN TOPIC well clear of the POLANICA.

The POLANICA has made no effort to show that her failure to give warning of this danger did not, let alone that it could not, have caused the collision.

At 1901, when the order was given to go full astern and drop both anchors, no full astern signal was given; no radio warning was given. Again, the POLANICA has not shown that this failure did not, let alone that it could not, have caused the collision.

B. The Interrogatories

Following the collision, the vessels returned to the Port of Mobile. In view of uncertainty with regard to the steering of the POLANICA, competent surveyors were employed to test the steering of the POLANICA. They found nothing wrong.

The SERAFIN TOPIC, on November 15, 1973, propounded certain interrogatories to the POLANICA a portion of which were concerned with the striking by the POLANICA of the FEHMARN BELT in January, 1962, and requested information touching repairs to the steering apparatus of the POLANICA following this. In addition, the SERAFIN TOPIC asked if there had been any occasion of difficulty or failure of the

steering gear of the POLANICA between January 11, 1962 and the time of the collision with the SERAFIN TOPIC on April 16, 1973, and sought information touching the circumstances of such failures, and what repairs or changes, if any, had been made with regard to the steering apparatus of the POLANICA. The objections of the POLANICA to these interrogatories were granted by the District Court who said that the events alleged to have occurred in 1961 and 1962 are too far removed in point of time from the facts alleged in the pleading of this action.

C. The Motion For New Trial And Affidavits

One of the findings of the District Court is to the effect that the banks of the Mobile Ship Channel are not conducive to sheering. In so finding, the District Court found against an insistence made by the SERAFIN TOPIC, throughout the trial, that the POLANICA in fact did sheer, an insistence derived from the acknowledgement from those in charge of the navigation of the POLANICA that she was feeling bank suction before the time of the collision; was not responding to her rudder; the actual position of impact on the port side of the SERAFIN TOPIC, plus the observations of all those who viewed the POLANICA before the collision from the SERAFIN TOPIC.

In view of the District Court's finding that the Mobile Ship Channel is not conducive to sheering, the SERAFIN TOPIC filed with the Court numerous affidavits from Mobile Bar Pilots, whose actual ex-

perience it is to take vessels in and out of that channel, and sought a new trial. The affidavits (a typical one of which is attached to this petition, in the Appendix at pp. 33a-34a) are all to the effect that both deep draft and light draft vessels will be caused to sheer if they approach too closely to either bank of the channel. Each of the pilots states he has experienced this situation on several occasions, in different parts of the channel, and none of them are aware of any Mobile Bar Pilot who has not experienced sheer in that channel. With these affidavits, and others, the SERAFIN TOPIC sought a new trial.

By order dated July 1, 1974, the said affidavits were stricken and subsequently the Court, after making additional amendments to its findings, denied the SERAFIN TOPIC's motion for a new trial on July 23, 1974.

REASONS FOR GRANTING WRIT

The Court of Appeals, in its decision of April 9, 1976, affirming the District Court, has decided a federal question in a way in conflict with the applicable decisions of this Honorable Court and has sanctioned, by the District Court, such a departure from the accepted and usual course of judicial proceedings, as to call on this Honorable Court to exercise its power of supervision.

A determination, by this Court, of whether the Vessel Bridge-to-Bridge Radiotelephone Act, 33 U.S.C., Sec. 1201, et seq., and its implementing regulations, constitute statutes designed to prevent collisions is needed.

ARGUMENT

A. The Statutory Violations

This Court first enunciated the importance of compliance with the statutory rules to avoid collision in *The Pennsylvania*, 19 Wall. (89 U.S.) 125, saying:

> "But when, as in this case, a ship at the time of a collision, is in actual violation of a statutory rule intended to prevent collisions, it is no more than a reasonable presumption that the fault, if not the sole cause, was at least a contributory cause of the disaster. In such a case the burden rests upon the ship of showing not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been. Such a rule is necessary to enforce obedience to the statute."

That this rule still has application was recognized as recently as this court's decision on May 19, 1975 in *United States vs. Reliable Transfer Company, Inc.*, ___ U.S. ___, 1975 A.M.C. 541, at page 548.

Although the facts have been presented to them, in full, neither the District Court, nor the Court of Appeals, have seen fit to make any findings, reach any conclusions, or express any opinion with regard to violations of *The Pennsylvania* rule. They do not deny the violations; they simply ignore the matter.

At the time of the collision, the POLANICA was in violation of Rule III of Sec. 203, T. 33, U.S.C. She did not, when danger became apparent, sound any alarm

or danger signal, although the District Court found the POLANICA's pilot, some two or three minutes before the collision, was not coming ahead as he had anticipated. In this situation, the POLANICA was in clear violation of *The Pennsylvania* rule. *The Albert Dumois*, 177 U.S. 240; *Duluth S.S. Co. vs. Pittsburg*, 180 Fed. 656; *Mother Grace, Inc. vs. U.S.A.*, 1974 A.M.C. 44; *A. H. Bull S.S. Co., etc. vs. SS Exanthia*, 234 F. 2d 650; *Henry Du Bois Sons Co. vs. A/S Ivarans Rederi*, 116 F. 2d 492 (2 CCA).

Like numerous other courts have done, the court in *Compania de Navegacion Cristobal vs. The Lisa R.*, 112 F. Supp. 501 (D.C.E.D. La.) has quoted *The New York*, 175 U.S. 187, saying:

". . . In this connection it may be well to repeat again the injunction of *The New York*, 175 U.S. 187, 20 Su.Ct. 67, 72, 44 L.Ed. 126. Perhaps, if mariners would read it again and again, it may finally come to have the desired effect:

" 'She should have stopped her engines after the second signal, and, if necessary to bring her to a complete standstill, have reversed them. Nothing is better settled than that, if a steamer be approaching another vessel which has disregarded her signals, or whose position or movements are uncertain, she is bound to stop until her course be ascertained with certainty. (Citing cases) * * *

" 'The lesson that steam vessels must stop their engines in the presence of danger, or

even of anticipated danger, is a hard one to learn, but the failure to do so has been the cause of the condemnation of so many vessels that it would seem that these repeated admonitions must ultimately have some effect.' "

To the same effect see *Duluth S.S. Co. vs. Pittsburg, supra; Skaustrand — P. W. Thirtle*, 64 A.M.C. 565, 227 F. Supp. 281, affirmed 345 F. 2d 275, cert. den. 382 U.S. 918; *A. H. Bull S.S. Co. vs. Chesapeake S.S. Co.*, 101 F. 2d 599.

The *Skaustrand — P. W. Thirtle, supra*, involved a situation in which the Thirtle was passing a dredge, and went some 100 feet into its wrong side of the channel. The Skaustrand, coming in the opposite direction, had blown a danger signal, but failed to slow and stop. Both vessels were held at fault.

To a similar effect, in a crossing situation, is the decision of this court in *Postal S.S. Corp. vs. El Isleo*, 308 U.S. 378.

In *Tank Barge Hygrade, Inc. vs. Tug Gatco New Jersey*, 250 F. 2d 485, the Third Circuit Court of Appeals states that had the Hayes blown a danger signal and immediately reversed her engines instead of blowing a second passing signal, the Gatco might have desisted from its intended course and taken action which could have avoided the collision.

With the difference that no signals at all were sounded, the situation found by the First Circuit Court of

Appeals in *Algonquin Deep Sea vs. Perini Corp.*, 457 F. 2d 755, 1974 A.M.C. 741, is remarkably like the one at bar. See particularly note 9, 1974 A.M.C. at page 744.

Intimately related to the fault of the POLANICA in this regard is the last clear chance doctrine. *The Perserverance*, 63 F. 2d 788, cert. den. 289 U.S. 744; *The Sanday — The Michigan*, 122 F. 2d 325.

The POLANICA failed to sound her full astern signal in violation of Sec. 213 of T. 33, U.S.C. Admittedly, the POLANICA went full astern some two minutes before the collision. Admittedly, the vessels were in sight of one another, but the POLANICA failed to sound three short blasts on her whistle in violation of the statute in question. In so failing, she was guilty of another statutory fault, *The Straits of Dover*, 120 Fed. 900; *The Georgetown*, 135 Fed. 854.

In failing to slow and stop, at an earlier time, the POLANICA was in violation of Sec. 208, T. 33, U.S.C., *The Munaires*, 1 F. 2d 13; *Elmer A. Sperry — Tower Grange*, 1948 A.M.C. 1885.

It has been held that passing a dredge, within 200 feet of that dredge, at a speed in excess of five miles an hour constitutes a violation of Sec. 80.27 of T. 33, C.F.R. *In Re Tug Management Corporation*, 330 F. Supp. 486. Here the Court stated:

> "Captain Carter testified that he passed off the Dredge by about seventy-five feet, at approximately half-ahead, or seven knots. Excessive speed has consistently been held to be a statutory fault within the rule of *The Pennsylvania*, supra. *A. H. Bull S.S. Co. of Baltimore City*, 101 F. 2d 599 (4th Cir. 1939) (and other citations)" . . . . .

In view of the recognized facts of the contemplated passing, that is to say, that both vessels were attempting to avoid passing each other at a time when they were passing a working dredge in the channel; together with the necessity for the SERAFIN TOPIC to slow appreciably that this might be accomplished, the POLANICA was additionally in violation of Sec. 212 of T. 33, U.S.C. and Sec. 221 of T. 33, U.S.C. The *Elmer A. Sperry — Tower Grange*, 1948 A.M.C. 1885; the *Skaustrand — P. W. Thirtle*, 227 F. Supp. 281, 1964 A.M.C. 565, affirmed, *Dredge Cartegena vs. T/T P. W. Thirtle*, 345 F. 2d 275, cert. den. 382 U.S. 918.

It is not suggested the special circumstances called for a change of the passing arrangement; this was not contemplated by either vessel. Rather, the circumstances were such that, with the POLANICA having been advised that the SERAFIN TOPIC was drifting, because of her necessarily slower speed, she was called upon to take extra precautions, precautions she wholly failed to take.

The foregoing violations constitute violations of statutes designed to give warning of danger, and to take precautions against collision. The POLANICA did not attempt to show that these violations were not, or could not have been, the cause of the collision.

On the order "drop both anchors," through misunderstanding, only the port anchor was dropped.

Obedience to the order may have prevented the collision, or substantially reduced the damage. *Afran Transport Co. vs. SS Transcolorado*, 458 F. 2d 164, (note 12, p. 170).

B. The Bridge-to-Bridge Radiotelephone Act, T. 33, U.S.C., Sec. 1201, et seq.

In addition, the POLANICA was in violation of the Bridge-to-Bridge Radiotelephone Act, T. 33, U.S.C., Sec. 1201, et seq. and the regulations promulgated implementing that Act, T. 33, C.F.R., Sec. 26.04 (b) and T. 47, C.F.R., Sec. 83.251 (a) and (b).

True, the POLANICA's pilot had advised he was passing the dredge. The SERAFIN TOPIC, realizing it would be necessary to pass under the stern of the POLANICA and then move to the west side of the channel thereafter, felt it unsafe to go full ahead, on receipt of this message, in fear of striking either the POLANICA or the dredge. The POLANICA moved to her own right hand side of the channel, and found she was not responding to her starboard rudder. The SERAFIN TOPIC was not aware of this failure to respond. Feeling danger was imminent, the POLANICA put her rudder hard starboard. Again, the SERAFIN TOPIC was not aware of this. The POLANICA subsequently ordered full astern and drop both anchors; again, the SERAFIN TOPIC was not aware of this. The POLANICA could have, but did not, inform the SERAFIN TOPIC by radiotelephone of all these matters, when they occurred, and could have, but did not, tell the SERAFIN TOPIC she was crowding the POLANICA when inquiry was made, or without inquiry.

It is appropriate that this Honorable Court address itself to the question of whether or not the "Vessel Bridge-to-Bridge Radiotelephone Act", and the regulations promulgated under that Act, constitute statutes and regulations designed for the purpose of avoiding collisions.

The intent of Congress is shown by the committee report of the Committee on Merchant Marine and Fisheries (1971 U.S. Code Cong. and Adm. News, p. 1237) which states:

> "The purpose of the bill is to reduce vessel collisions and other mishaps . . . ."

The Committee Report discusses a number of collisions and refers to one occurring in San Francisco Bay in which both vessels were properly equipped, but one vessel either secured her radio or shifted to some other channel, commenting:

> "The most modern and efficient radio equipment in the world is of little use if no one is listening." (1971 U.S. Code and Cong. Adm. News, at page 1239)

There was no effort, on the part of the POLANICA, to show that this failure to advise of these situations did not, or could not have, caused the collision.

C. The Interrogatories

Petitioner, on pages 14 and 15 supra has stated the position with reference to the granting of objec-

tions to petitioner's interrogatories. In so granting these objections, the District Court overreached its discretion.

D. The Motion For New Trial

The facts with reference to petitioner's filing of affidavits by pilots from the Mobile Bar Pilot's Association and of its motion for a new trial are set out in its statement of the case. In striking these affidavits, and in overruling petitioner's motion for a new trial, the District Court abused its discretion.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for writ of certiorari should be granted.

John H. Tappan
Attorney for Termar Navigation
Company, Inc., et al

CERTIFICATE OF SERVICE

I certify that three copies of the foregoing petition have been served on Mr. Oliver Latour, Jr. and Mr. James Tarlton, III, on the ___ day of August, 1976, by United States Mail, postage prepaid, at their mailing address, Post Office Box 1743, Mobile, Alabama 36601.

John H. Tappan

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

In the United States District Court for the
Southern District of Alabama
Southern Division

TERMAR NAVIGATION COMPANY, INC., as managing owners of the SERAFIN TOPIC,
Plaintiff,

versus CA NO. 7628-73-T

S/S POLANICA, and against POLSKIE LINIE OCEANICZNE, as owner of the S/S POLANICA.
Defendants.

FINDINGS OF FACT

1. At or about 1903 hours on the 16th day of April, 1973, the S/S POLANICA, which was proceeding down the Mobile Bay Ship Channel and the S/S SERAFIN TOPIC, which was proceeding up said Channel, collided in the middle reach of said Channel just north of Beacon 32. The POLANICA is a cargo vessel of 3441 gross tons registered under the Polish flag and was manned by a Polish crew. The SERAFIN TOPIC is a cargo vessel of 11,163 gross tons of Liberian registry and was manned by a Yugoslavian crew. Both vessels at the time of the collision were under the direction of licensed Mobile Bar Pilots who were equipped with walkie-talkie radios customarily used by Mobile Bar Pilots.

2. The S/S POLANICA, a general cargo ship 407.2' in length with a breadth of 54'-1/2", was built in

Poland in 1958. At the time of the collision, there were approximately 1300 tons of cargo on board the POLANICA, which had a draft forward of 12'7" and a draft aft of 18'. The SERAFIN TOPIC, which was built in 1962 in Japan, was 531.4' in length and had a breadth of 68'3". The SERAFIN TOPIC had sailed from Karmoy, Norway to Mobile in ballast and had discharged additional ballast as it proceeded to Mobile. The draft forward on the SERAFIN TOPIC at the time of the collision was 9'3" and her draft aft was 16'3". The radars on both vessels were in operation. The SERAFIN TOPIC maintained her radar on a 6 mile range from the time she entered Mobile Bay Channel until the time of the collision. The bridge of each vessel was located aft.

3. On board the bridge of the POLANICA at the time of the collision were Captain John Miller, the Mobile Bar Pilot, her Master, her Mate, the Deck Assistant, one seaman lookout, and the helmsman. The carpenter was stationed on the port side of the forecastle head. On board the bridge of the SERAFIN TOPIC at the time of the collision were Captain S. E. Dorgan, the Mobile Bar Pilot, her Master, her Mate, and the helmsman. The SERAFIN TOPIC did not have a lookout stationed on the bridge or bow; however, there was a seaman stationed on the bow with the sole duty to drop anchors.

4. The Mobile Bay Channel, which runs in a general North/South direction, has a width in the middle reach of 400 feet, with a dredged depth of approximately 40 feet. The Channel is maintained by the U.S. Corps of Engineers. The Beacons and buoys are located approximately 150 feet east and west of the 400

foot dredged portion of the Channel. The depth of the water under the beacons is approximately 15 feet and gradually slopes down for 150 feet until it reaches the 40 foot depth which commences the 400 foot wide dredged channel. Extending on either side of the beacon lines is water depth of at least 8 feet for a distance of some 2000 feet to the spoil banks.

5. The wind in Mobile Bay Channel at the time of the collision was East-Southeast at approximately 14-22 knots and gusting. There was approximately a 1-1/2 to 2 feet tide at the time and place of the collision. The current was running south at approximately 1 knot. The weather at the time of the collision was overcast with good visibility ranging from 5 to 7 miles.

6. The POLANICA maintained 3 logs on board the bridge on the night of the collision; the bridge bell book, the rough deck log, and the smooth deck log. Acting under the direct supervision of the Mate, the deck assistant on board the bridge of the POLANICA maintained the bridge bell book and the rough deck log. All entries were made in pen and were made immediately after each order was given, except that the entries in the smooth deck log were made after the watch ended. The POLANICA's bridge bell book and rough deck log fully portray the actions and maneuvers of the POLANICA from the time she departed from the Alabama State Docks until the time of the collision. By contrast, the last entry in the rough deck log on the SERAFIN TOPIC prior to the collision was 1642 hours, which was the time the Pilot boarded the SERAFIN TOPIC prior to the vessel entering Mobile Bay Channel. No other entries appeared in the

rough deck log until approximately 5 hours later when the SERAFIN TOPIC had docked at the Alabama Dry Dock & Shipbuilding Company after the collision. All entries in the bridge bell book and the rough deck log of the SERAFIN TOPIC were made in pencil and were maintained by the Chief Officer.

7. Prior to leaving the Alabama State Docks at approximately 1810, the POLANICA conducted the routine tests, including a routine check of the steering gear and compared times between the bridge clock and the engine room clock. The POLANICA departed the Alabama State Docks in daylight and proceeded down Mobile Bay Channel. As she proceeded south prior to reaching Beacon 38, she passed two inbound vessels, port-to-port. Just after passing Beacon 38 the POLANICA sighted the dredge DAVE BLACKBURN which was dredging south on the East side of the Mobile Bay Channel located between Beacons 33 and 34. Shortly thereafter, the pilot on board the POLANICA, Captain John Miller, radioed the dredge DAVE BLACKBURN and advised that the POLANICA would come by on one blast. The pilot on the SERAFIN TOPIC, which had been proceeding up the Channel in the vicinity of Beacon 28 overheard the conversation between the POLANICA and the dredge DAVE BLACKBURN. The pilot on board the SERAFIN TOPIC, Captain Sidney E. Dorgan, Jr., not wanting to risk meeting in the vicinity of the dredge, contacted the pilot on board the POLANICA and both pilots agreed that the POLANICA would pass the dredge first and that the SERAFIN TOPIC would wait for the POLANICA to pass the dredge and that the vessels would pass each other port-to-port. After agreeing that the POLANICA would pass the dredge first and

that the SERAFIN TOPIC would wait, the SERAFIN TOPIC, which had been proceeding at 15 knots sea speed, continued for some distance thereafter up the Channel at 15 knots.

8. Although the pilot on board the SERAFIN TOPIC testified that he was expert in the use of the radar and constantly used the radar on board the SERAFIN TOPIC, he did not pick up the POLANICA on radar until the vessels were each 1.5 miles away from the dredge DAVE BLACKBURN, or until the time the POLANICA was three miles from the SERAFIN TOPIC. According to the pilot on board the SERAFIN TOPIC, his radar would not have picked up the POLANICA until she was three miles from the SERAFIN TOPIC even if the SERAFIN TOPIC had switched to a larger range on her radar. The failure of the SERAFIN TOPIC's radar to pick up the POLANICA may be attributable to the fact that several of the booms forward of the bridge on board the SERAFIN TOPIC were rigged or topped for discharge which could have interfered with the radar reception according to the Captain of the SERAFIN TOPIC, or because the SERAFIN TOPIC was light with a draft forward of 9'3" which caused the bow to ride high in the water. Difficulty with the radar is further suggested by the pilot of the SERAFIN TOPIC, who testified that when he first sighted the dredge DAVE BLACKBURN on radar, he initially thought it was a tow.

9. After the agreement for the port-to-port passing was made between the two pilots, the POLANICA proceeded at full speed, which was approximately 13 knots, for about 11 minutes. As the POLANICA proceeded down the Channel the lights of the

SERAFIN TOPIC were sighted visually some five or six miles away. The pilot, as the POLANICA passed certain beacons, would radio his location by beacon number to the pilot of the SERAFIN TOPIC. Although the pilot of the POLANICA gave his location in terms of miles from the dredge, the pilot of the POLANICA testified that he only gave his location by references to beacon numbers and that he did not ever make reference to his distance from the dredge. This was confirmed by the Captain of the SERAFIN TOPIC who testified that he overheard the radio conversations of the two pilots wherein the POLANICA pilot gave his location by beacon number.

10. The SERAFIN TOPIC continued up Mobile Bay Channel at full speed ahead until such time as she finally sighted the POLANICA on her radar, at which time the POLANICA was 1.5 miles north of the dredge and the SERAFIN TOPIC was 1.5 miles south of the dredge. Notwithstanding the fact that the vessels were closing on the dredge at approximately the same rate of speed, The SERAFIN TOPIC continued at full speed ahead for several minutes thereafter, or until the vessels were each 1.1 miles from the dredge.

11. The POLANICA, which had been proceeding at full speed ahead since 1844 hours slowed to half-ahead at 1857 according to her bridge bell book, and passed the dredge DAVE BLACKBURN at 1858. The SERAFIN TOPIC, which had been proceeding at full ahead and then slow ahead, stopped her engines for 6 minutes. The clocks on the POLANICA were 4 minutes ahead of those on the SERAFIN TOPIC. A comparison of the correlated times of the bridge bell books of each vessel shows that the engines of the SERAFIN TOPIC

were on stop 5 minutes before the POLANICA passed the dredge and remained stopped for 1 minute thereafter.

12. The dredge DAVE BLACKBURN, extended 80 to 200 feet into the Channel from the East side, according to the testimony. At the time the POLANICA passed the dredge, the SERAFIN TOPIC was approximately 7/10th of a mile from the dredge.

13. At the time the POLANICA passed the dredge, the pilot of the POLANICA radioed the pilot of the SERAFIN TOPIC and advised that the POLANICA was passing the dredge at that time. This was a head to head meeting within the meaning of the Pilot Rules, and accordingly, the pilot of the POLANICA at that time requested the SERAFIN TOPIC to straighten up and come ahead. As the POLANICA passed the dredge, Pilot Miller observed the SERAFIN TOPIC laying at an approximate 10 degree angle across the Channel with her bow to the East. Personnel on the bridge of the POLANICA saw the red running light and the range lights of the SERAFIN TOPIC opened towards the east. The SERAFIN TOPIC had been "crabbing," i.e., holding her bow to the east in an effort to compensate for the wind, and at that time was moving head very slowly, at approximately 3 knots, according to the Captain of the SERAFIN TOPIC. According to the pilot of the POLANICA, the SERAFIN TOPIC's pilot stated that he wanted to wait a few minutes before he straightened up and came ahead and further urged the pilot of the POLANICA to hurry by as he, the SERAFIN TOPIC, was about to blow ashore. Pilot Miller anticipated that the SERAFIN TOPIC would straighten out, permitting the POLANICA to pass her

port-to-port. Using the corrected times for her bridge bell book, the SERAFIN TOPIC did not come ahead at that time, as her engines remained on stop one minute more and then the engines were placed on dead slow ahead.

14. At the time the POLANICA passed the dredge, certain of the beacons on each side of the Channel beyond the SERAFIN TOPIC were visible. Shortly after passing the dredge, the POLANICA executed a starboard easy order. At that time the red beacon light on Beacon 32, located on the Eastern side, disappeared from view, leaving only a green beacon light at Theodore visible (which was located outside the Western side of the Channel). When the POLANICA was approximately 600 feet away from the SERAFIN TOPIC, she executed another starboard order in an effort to line up with the green beacon at Theodore. Momentarily thereafter the stern of the SERAFIN TOPIC, which was drifting Westwardly, blocked the green Theodore beacon from view. The testimony shows that even when the vessels were 600 feet apart the SERAFIN TOPIC was moving very slowly and continued to "crab" up the Channel. The SERAFIN TOPIC remained angled across the Channel but was being set to the West. Pilot Miller, realizing that the SERAFIN TOPIC was not going to straighten out, ordered the POLANICA hard starboard in an attempt to go around, ordered anchors dropped and the engines full astern. This was approximately 2 minutes prior to the collision. The port anchor was in fact dropped, the brake applied, the engines placed full astern, and the rudder placed hard starboard where it remained until after the collision. The seaman located on the bow of

the SERAFIN TOPIC testified that he heard the anchors of the POLANICA going out when the POLANICA was at least a vessel's length away, i.e., some 400 to 500 feet. However, he testified that he did not notify the bridge of the SERAFIN TOPIC of this fact because his only duty was to drop the anchor and that he had no duty to report anything to the bridge (see page 22 - deposition of Vladimir Jovic, A.B. on bow).

15. Until 2 minutes prior to the collision the engines of the SERAFIN TOPIC had been stopped for 6 minutes, according to her bridge bell book. She then put her engines on dead slow ahead for 1 minute, at which time the Captain of the SERAFIN TOPIC estimated her speed at 3 knots. It is further undisputed that the wind, which was blowing East-Southeast and against the starboard side of the SERAFIN TOPIC tended to push the SERAFIN TOPIC toward the Western bank and into the path of the POLANICA. A review of the testimony offered through witnesses and the bridge bell book of the SERAFIN TOPIC reflects that the SERAFIN TOPIC was very much concerned about the passing taking place too close to the dredge and through her own witnesses stated that she did not want to get too far over to the east side. In fact, the pilot of the SERAFIN TOPIC testified that he was concerned whether he was crowding the POLANICA. This was notwithstanding the request by the pilot of the POLANICA for the SERAFIN TOPIC to straighten up and come ahead when the POLANICA passed the dredge. Instead, the SERAFIN TOPIC continued to kill time and attempted to delay her forward progress so that the meeting would take place as far south of the dredge as possible. Although this was a head to head

meeting, the pilot of the SERAFIN TOPIC stated that he did not intend to come ahead and straighten out his vessel until the bow of the POLANICA had passed the bow of the SERAFIN TOPIC. Less than 30 seconds before the collision, the SERAFIN TOPIC executed a full ahead and a hard starboard simultaneously. This maneuver caused the stern of the SERAFIN TOPIC to swing further to the west and further in front of the path of the POLANICA.

16. It was immediately apparent that the SERAFIN TOPIC did not intend nor had she commenced her passing maneuver when the vessels were 200-300 feet apart. Only when collision seemed inevitable did the SERAFIN TOPIC take any action to straighten out or come ahead. The action ultimately taken by the SERAFIN TOPIC aggravated rather than alleviated the situation.

17. The port side of the bow of the POLANICA collided with the port side of the SERAFIN TOPIC approximately 9 feet aft of the plimsoll mark of the SERAFIN TOPIC. The angle of impact was estimated from 20 to 50 degrees by the various witnesses. It was further established that the initial impact by the vessels was only a glancing blow. The initial impact caused the POLANICA to list to her starboard and then as she straightened up, she touched the SERAFIN TOPIC again, bounced away, and then the port side of the bow of the POLANICA caught the housing of the SERAFIN TOPIC located aft, causing extensive damages to the SERAFIN TOPIC and to the port side of the bow of the POLANICA.

18. The SERAFIN TOPIC proceeded toward the east momentarily after the collision and then continued up the Channel toward Mobile where she passed the dredge DAVE BLACKBURN and went aground on the West side of the Channel near Beacon 34 at approximately 1920 hours. After efforts to free herself failed, a Mobile tug was dispatched and freed the SERAFIN TOPIC after pulling her bow toward the east for approximately 2 minutes. Those on board the SERAFIN TOPIC are not agreed as to the maneuvers of the SERAFIN TOPIC immediately after the collision. According to the pilot of the SERAFIN TOPIC, he immediately stopped his engines after the collision, and because of the strong wind, he was blown toward the Western bank at which time he placed his engines full ahead for one minute but found himself against the West bank. The wind was too strong for him to free himself from the West bank. The Captain of the SERAFIN TOPIC testified that the SERAFIN TOPIC after the collision placed her engines on full ahead for one full minute and resumed a course of 355 degrees, the same course as she had been following up the Channel prior to the collision, when it was ascertained that the ship was aground and then the engines were stopped. The evidence was further conflicting as to whether the SERAFIN TOPIC blew aground immediately after the collision or whether grounding occurred some 20 minutes thereafter. The evidence tends to show, however, that the SERAFIN TOPIC proceeded up the Channel after the collision and then went aground after passing the dredge. Furthermore, it is undisputed that the wind was strong enough to force the SERAFIN TOPIC against the bank and also strong enough to prevent the SERAFIN TOPIC from bringing her bow back into the east sufficient to free herself.

19. The POLANICA dropped her port anchor approximately 2 minutes prior to the collision. After the collision the stern of the POLANICA swung clockwise against the wind by using her engines and with the assistance from the current. The POLANICA ended up on the extreme Western side of the Channel where she remained for several minutes checking her damages. The POLANICA then proceeded to the port of Mobile without difficulty, passing the SERAFIN TOPIC which was ashore on the Western side of the Channel north of Beacon 34.

20. It has been established to the satisfaction of the Court that the wind was East-Southeast, 16-22 knots, and gusting. It is also undisputed that as the speed of the wind increases, the wind force increases geometrically. It is further undisputed that the wind was tending to force the SERAFIN TOPIC to the West. One of the Defendant's expert witnesses testified and the Court finds that a 22 knot wind exerted a force against the starboard side of the SERAFIN TOPIC equal to that of a 2000 horsepower tug or 20 tons.

21. It is further undisputed that the maneuverability of a vessel is reduced by the effect of shallow water and that maneuverability is directly connected to the propeller wash against the rudder. When the engines are stopped the force of the water against the rudder is not present. As with the wind, the propeller wash force against the rudder increases geometrically. Therefore, the slower the propellers move, the less the force exerted against the rudder. It was further established that the maneuverability of a vessel moving 10 knots without propeller wash is greatly reduced as

compared to a vessel moving at 10 knots with propeller wash. The evidence establishes without contradiction that the SERAFIN TOPIC stopped her engines for 6 minutes, then proceeded at dead slow ahead for 1 minute, at which time her Captain estimated her speed at approximately 3 knots, and then moved slow ahead for 1 minute. During this time the wind caused the SERAFIN TOPIC to drift to the West into the path of the POLANICA.

22. The Court finds that the POLANICA had no steering gear malfunction on the night of the collision nor was there any evidence to indicate any momentary malfunction. The steering mechanism on the POLANICA was powered by two hydraulic pumps powered by two electric motors. The POLANICA carried two separate electrical steering systems. The POLANICA, at the time of the collision, was operating on both pumps and motors, since it was customary while maneuvering to use both, while at sea she used only one pump and motor. Although the SERAFIN TOPIC engaged two marine surveyors who conducted unrestricted surveys on the POLANICA's steering apparatus on two separate occasions, one only two days after the collision, neither of these experts was called by the SERAFIN TOPIC. On the other hand, the POLANICA introduced the expert testimony of John N. van Aken, the marine surveyor who attended both surveys conducted by surveyors on behalf of the SERAFIN TOPIC and who testified that both tests were satisfactory and disclosed no malfunction nor defects. He further testified that in his expert opinion, the POLANICA had no steering gear malfunction or difficulty on the night of the collision. In addition, those on the bridge of the POLANICA testified that

they observed no steering malfunction prior to or after the collision, and that none of the warning systems, (red light and buzzer) on board the POLANICA designed to alert the bridge and engine room against such malfunctions sounded. The Captain of the POLANICA also testified that the steering gear had been checked in February 1973, during routine dry docking. Her Chief Engineer testified by deposition that no repairs or adjustments were made to the steering mechanisms between the time of the collision and its subsequent surveys. The Court therefore finds that the steering gear mechanism on board the POLANICA was in proper working order at the time of the collision.

23. The Court further finds that the POLANICA was properly navigated on the night of the collision. The helmsman on the POLANICA had far more experience than the helmsman onboard the SERAFIN TOPIC. The only instructions received by the helmsman of the SERAFIN TOPIC concerning steerageway was to advise in the event the SERAFIN TOPIC failed to maintain a course of 355 degrees. Such instructions were inadequate since a vessel could maintain a course of 355 degrees and yet have no meaningful indication as to her position in the channel.

24. Those aboard the SERAFIN TOPIC contended that by observing the navigation lights of the POLANICA they determined that the POLANICA sheered off the west bank and veered across the path of the SERAFIN TOPIC. This same effect could have been created to those aboard the SERAFIN TOPIC by the SERAFIN TOPIC being blown too far to the westward and indeed in the path of the POLANICA.

25. There was considerable testimony on both sides as to sheering, its effect and its cause. The uncontradicted testimony from the U.S. Corps of Engineers concerning the configuration of the channel bottom is that at the time and place of this accident, the dredged channel is 400 feet wide with an approximate depth of 40 feet. The beacons and bouys are located 150 feet outside the 40 foot dredged channel on each side thereof. The depth of the water at the beacon line, 150 feet outside the main channel, was approximately 13 feet at mean, low water. The evidence showed that at the time and place in question a 1-1/2 to 2 foot tide which would increase the depth of the water in this amount. Extending outwardly from the beacon and buoy lines there was a water depth of approximately 8 feet for approximately 2,000 feet.

All of the testimony as to the cause of sheering is to the effect that it occurs in narrow channels where the sides of the channel are more or less vertical, which causes pressure to build up between the ship and the bank of the channel which forces the bow outbound from the bank and the stern sucked inward. The evidence offered at the trial convinces the Court that the configuration of the bottom and sides of the channel at the time and place in question are not conducive to sheering.

26. The Court finds that at the time the POLANICA passed the dredge DAVE BLACKBURN, she was well to the west of the DAVE BLACKBURN and in the approximate center of the channel and that shortly thereafter she moved to the westward. At the time of the collision the POLANICA was well on her west side of the channel and the SERAFIN TOPIC, being light and reducing her speed in order that the two ships

would not pass the dredge at the same time, lost steerageway and was blown into the path of the POLANICA.

27. The Court finds that the passing maneuver agreed upon by the two pilots, namely, that the POLANICA would pass the dredge first and that the ships would pass to the southward of the dredge in a port-to-port passage was proper.

28. The Court finds that the SERAFIN TOPIC negligently allowed herself to drift to the west side of the channel blocking the path of the POLANICA and failed to straighten up and come ahead sufficiently so as to allow the POLANICA to pass safely on the west side of the channel in accordance with the port-to-port passage previously agreed to by both ships. This was the proximate cause of the collision.

CONCLUSIONS OF LAW

1. This Court has jurisdiction of the matter under the general maritime law. 28 U.S.C. §1333.

2. The original action was filed by the owners of the SERAFIN TOPIC against the owners of the S/S POLANICA and a counterclaim was made by the owners of the S/S POLANICA against the owners of the SERAFIN TOPIC.

3. The S/S POLANICA was in no way at fault in the collision which is the subject matter of this suit.

4. The rules of navigation more commonly known as the Inland Rules, are applicable. 33 U.S.C. § 154, *et seq*.

5. The S/S SERAFIN TOPIC's assent to a port-to-port passing placed on her the responsibility to direct her course to starboard sufficiently to enable the vessels to negotiate the passing with safety to both. *The Sulphite*, 73 F.Supp. 137 (E.D. Mich. 1947).

6. Steam vessels, "when it is safe and practicable," are required to keep to the starboard side of the fairway or mid-channel in narrow channels under the Inland Rules. 33 U.S.C. §210. The Mobile Ship Channel is a narrow channel within the provisions of the Inland Rules.

7. The Narrow Channel Rule is not inflexible and special circumstances may justify a departure. 33 U.S.C. §212, *Punch v. M/V Captain Kirk, etc.*, 1972 A.M.C. 1834 (E.D. La. 1971). The facts in the case at bar do not warrant such a departure.

8. The navigable channel was sufficiently wide for both vessels to pass each other port-to-port, with care and circumspection.

9. The SERAFIN TOPIC's failure to maintain her course as near to the east bank of the channel as she could with safety after agreeing to the port-to-port passage was a violation of the Inland Rules and was the sole fault of the collision. See *The Standella*, 108 F.2d 619 (5th Cir. 1939); *Hess Shipping Corporation v. SS Charles Lykes*, 285 F.Supp. 412, 414 (S.D. Ala. 1968), Aff'd. 417 F.2d 346 (5th Cir. 1969), cert. denied, 400 U.S. 858 (1970). *The Sulphite*, supra at 140.

The Court having found that the negligence of the SERAFIN TOPIC was the proximate cause of the colli-

sion and that the POLANICA was free from fault, takes this case out of a divided damage situation and places the sole responsibility upon the SERAFIN TOPIC. It was stipulated at pretrial that this case would be tried on the question of liability and that the damages would be determined in subsequent proceedings, if necessary.

Let an interlocutory decree be entered in favor of POLSKIE LINIE OCEANICZNE, as owner of the S/S POLANICA and against the TERMAR NAVIGATION COMPANY, INC., as managing owners of the SERAFIN TOPIC.

INTERLOCUTORY DECREE

It is ORDERED, ADJUDGED and DECREED that POLSKIE LINIE OCEANICZNE, as owner of the S/S POLANICA recover and have from TERMAR NAVIGATION COMPANY, INC., as managing owners of the SERAFIN TOPIC, the damages sustained by it in consequence of the collision in question, together with interest and costs, and that the complaint of TERMAR NAVIGATION COMPANY, INC. be DISMISSED with costs. The parties are DIRECTED to within thirty (30) days from this date agree on damages and failing that, the case will again be set for trial to determine the damage question.

The 6th day of June 1974.

/s/ DANIEL H. THOMAS
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

TERMAR NAVIGATION COMPANY, INC., as managing owners of the SERAFIN TOPIC,
Plaintiff,
versus C.A. No. 7628-73-T

S/S POLANICA, and against POLSKIE LINIE OCEANICZNE, as owner of the S/S POLANICA,
Defendants.

ORDER AMENDING FINDINGS OF FACT

In order to correct the Court's Findings of Fact and Conclusions of Law entered in the above-styled cause on June 6, 1974, the Court hereby ORDERS the next to last sentence in Paragraph 9, page 5 of said Findings be stricken, and substitutes therefor the following:

"Although the pilot on board the SERAFIN TOPIC testified that the pilot of the POLANICA gave his location in terms of miles from the dredge, the pilot of the POLANICA testified that he only gave his location by references to beacon numbers and that he did not ever make reference to his distance from the dredge."

DONE this the 11th day of June, 1974.

/s/ DANIEL H. THOMAS
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

TERMAR NAVIGATION COMPANY, INC.,
as managing owners of the SERAFIN TOPIC,
Plaintiff,
versus C.A. No. 7628-73-T

S/S POLANICA, and against POLSKIE LINIE OCEANICZNE, as owner of the S/S POLANICA,
Defendants.

AMENDMENT

The Findings of Fact and Conclusions of Law entered in this cause on June 6, 1974, and amended on June 11, 1974, is FURTHER AMENDED as follows:

Paragraph 5, Page 3 of the Findings of Fact is deleted and substituted in lieu thereof the following:

5. "The wind in Mobile Bay Channel at the time of the collision was East-Southeast at approximately 16-22 knots and gusting. There was approximately a 1-1/2 to 2 ft. tide at the time and place of the collision. The current was running South at approximately 1 knot. The weather at the time of the collision was overcast with good visibility ranging from 5 to 7 miles."

Paragraph 10 on Page 5 of the Findings of Fact is deleted and substituted in lieu thereof the following:

10. "The SERAFIN TOPIC continued up Mobile Bay Channel at full speed ahead until such time as she finally sighted the POLANICA on her radar, at which time the POLANICA was 1.5 miles north of the dredge and the SERAFIN TOPIC was 1.5 miles south of the dredge. Thereafter, the SERAFIN TOPIC placed her engines on half ahead, but the vessels continued to close on the dredge at approximately the same rate until the vessels were each 1.1 miles from the dredge."

Paragraph 21 of Page 11 is deleted and substituted in lieu thereof the following:

21. "It is further undisputed that the maneuverability of a vessel is reduced by the effect of shallow water and that maneuverability is directly connected to the propeller wash against the rudder. When the engines are stopped the force of the water against the rudder is not present. As with the wind, the propeller wash force against the rudder increases geometrically. Therefore, the slower the propellers move, the less the force exerted against the rudder. It was further established that the maneuverability of a vessel moving 10 knots without propeller wash is greatly reduced as compared to a vessel moving at 10 knots with propeller wash. The evidence establishes that the SERAFIN TOPIC stopped her engines for 6 minutes, then proceeded at dead slow ahead for 1 minute, at which time her Captain estimated her speed at approximately 3 knots, and then moved slow ahead for 1 minute. During this time the wind caused the

SERAFIN TOPIC to drift to the West into the path of the POLANICA."

Paragraph 27 on Page 14 is deleted and substituted in lieu thereof the following:

27. "The Court finds that the passing maneuver agreed upon by the two pilots, namely, that the POLANICA would pass the dredge first and that the ships would pass to the southward of the dredge in a port-to-port passage was proper. At no time after the agreement between the pilots was there ever any question that the vessels would pass other than port-to-port as agreed."

Conclusions of Law No. 3 on Page 15 is deleted and substituted in lieu thereof the following:

3. "The S/S POLANICA and those aboard her were not guilty of any fault which proximately caused or contributed to the collision which is the subject matter of this suit."

In all other respects, the Findings of Fact and Conclusions of Law entered in this case on June 6, 1974, and amended on June 11, 1974, are unchanged.

DONE this the 19th day of July, 1974.

/s/ DANIEL H. THOMAS
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1975

No. 74-3530

D. C. Docket No. CA 7628-73-T

TERMAR NAVIGATION COMPANY, INC., as Managing Owner of the SERAFIN TOPIC,
Plaintiff-Appellant,

versus

SS POLANICA, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Alabama

Before GEWIN and AINSWORTH, Circuit Judges, and MARKEY*, Chief Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Alabama, and was argued by counsel;

---

* Of the U. S. Court of Customs and Patent Appeals, sitting by designation.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that plaintiff-appellant pay to defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court.

April 9, 1976

Issued as Mandate: MAY 27, 1976

TERMAR NAVIGATION COMPANY, INC., as Managing Owner of the SERAFIN TOPIC,
Plaintiff-Appellant,

v.

SS POLANICA et al,
Defendants-Appellees.

No. 74-3530.

United States Court of Appeals,
Fifth Circuit.

April 9, 1976.

Appeal from the United States District Court for the Southern District of Alabama.

Before GEWIN and AINSWORTH, Circuit Judges, and MARKEY*, Chief Judge.

PER CURIAM:

Appellant Termar Navigation Company, Inc., owner of the cargo vessel *Serafin Topic*, seeks reversal of the judgment of the court below, which found the *Serafin Topic* solely responsible for a collision with the cargo vessel *SS Polanica*. The accident occurred at about 7:00 p.m. on April 16, 1973 in the Mobile Ship Channel. Both vessels were under the direction of licensed Mobile Bar Pilots. The *Polanica* was pro-

* Of the U.S. Court of Customs and Patent Appeals, sitting by designation.

ceeding south (outbound), and the *Serafin Topic* was heading north (inbound), when the vessels collided in the middle of the channel; the *Polanica's* bow struck the *Serafin Topic* a few feet aft of the plimsol mark (midship). There were no injuries, but both vessels sustained extensive damage. Termar Navigation brought suit against the *Polanica*, whose owner, Polski Linie Oceaniczne, counterclaimed. The case was tried on the liability issue only. We affirm.

The evidence presented to the court during the thirteen-day trial was extensive, and included depositions, oral testimony from a number of witnesses, and over 200 exhibits. The facts were, and are, hotly disputed at virtually every conceivable point. The district court entered extensive findings of fact and conclusions of law. Essentially, the court held that the collision was proximately caused by the *Serafin Topic's* negligence in allowing herself to drift westward into the path of the *Polanica* and failing to straighten up and come ahead sufficiently to allow the *Polanica* to pass safely; and that neither the *Polanica* nor those aboard her were guilty of any fault that proximately caused or contributed to the collision. The *Serafin Topic's* theory, rejected below, is basically that she was on her own (east) side of the channel, and that the collision occurred when the *Polanica* suddenly sheered to port.

On appeal, Termar Navigation complains of certain findings and conclusions of the trial court; of the court's failure to find particular facts; and of the court's rulings on some of the *Serafin Topic's* interrogatories. Our review of fact findings is governed by the dictates of Rule 52(a), F.R.Civ.P., which provides in part: "Findings of fact shall not be set

aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." Virtually every finding here required credibility choices by the trial judge, which makes appellant's burden in this court quite formidable. *Chaney v. City of Galveston*, 368 F.2d 774, 776 (5th Cir. 1966); *Smith v. United States*, 287 F.2d 299, 301 (5th Cir. 1961). Moreover, we have specifically held that the finding of fault in a collision case is primarily a fact issue to which the clearly erroneous rule applies. *Movible Offshore, Inc. v. M/V Wilken A. Falgout*, 471 F.2d 268, 272-73 (5th Cir. 1973); *A/R Seljan v. Pioneer Leasing Corp.*, 406 F.2d 768, 769 (5th Cir. 1969).

We have thoroughly reviewed and carefully considered the record and the contentions of the parties in their briefs and at oral argument, and we conclude that the court's findings are supported by the evidence and not clearly erroneous, and that its conclusions are correct.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Office of the Clerk
May 19, 1976

TO ALL COUNSEL OF RECORD

No. 74-3530 - Termar Navigation Company, Inc., as Managing Owner of the Serafin Topic v. SS Polanica, ET AL.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure: Local Fifth Circuit Rule 12) the petition for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk
/s/ SUSAN M. GRAVOIS
Deputy Clerk

cc: Messrs. John H. Tappan
James D. Brooks
Sidney H. Schell
Messrs. Oliver J. Latour, Jr.
James W. Tarlton, III

STATUTES AND REGULATIONS

T. 28, U.S.C., Sec. 1254 (1): jurisdiction of this Honorable Court:

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

T. 28, U.S.C., Sec. 1333 (1): original jurisdiction of the District Court:

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

T. 33, U.S.C., Sec. 203, R. III: the alarm or danger signal:

If, when steam vessels are approaching each other, either vessel fails to understand the course or intention of the other, from any cause, the vessel so in doubt

shall immediately signify the same by giving several short and rapid blasts, not less than four, of the steam whistle.

T. 33, U.S.C., Sec. 208: steam vessel's duty to slacken speed:

Every steam vessel which is directed by these rules to keep out of the way of another vessel shall, on approaching her, if necessary, slacken her speed or stop or reverse.

T.33, U.S.C., Sec. 212: the special circumstances rule:

In obeying and construing these rules due regard shall be had to all dangers of navigation and collision, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger.

T. 33, U.S.C., Sec. 213: signal of full speed of engines astern:

When vessels are in sight of one another a steam vessel under way whose engines are going at full speed astern shall indicate that fact by three short blasts on the whistle.

T. 33, U.S.C., Sec. 221: usual additional precautions required generally:

Nothing in these rules shall exonerate any vessel, or the owner or master or crew thereof, from the consequences of any neglect to carry lights or signals, or of

any neglect to keep a proper lookout, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case.

T. 33, U.S.C., Sec. 1201, et seq. (Sections 1201 and 1204): the Bridge to Bridge Radio Telephone Act:

1201 — It is the purpose of this chapter to provide a positive means whereby the operators of approaching vessels can communicate their intentions to one another through voice radio, located convenient to the operator's navigation station . . . .

1204 — The radiotelephone required by this chapter is for the exclusive use of the master or person in charge of the vessel, or the person designated by the master or person in charge to pilot or direct the movement of the vessel, who shall maintain a listening watch on the designed frequency. Nothing contained herein shall be interpreted as precluding the use of portable radiotelephone equipment to satisfy the requirements of this chapter.

T. 33, C.F.R., Sec. 80.27: speed of vessels passing floating plant working in channels:

Vessels, with or without tows, passing floating plant working in channels, shall reduce their speed sufficiently to insure the safety of both the plant and themselves, and when passing within 200 feet of the plant their speed shall not exceed five miles per hour. While passing over lines of the plant, propelling machinery shall be stopped.

T. 33, C.F.R., Part 26: Sec. 26.04 (b) and T. 47, C.F.R., Part 83, Sec. 83.251 (a) and (b): regulations implementing the bridge-to-bridge radiotelephone act:

T. 33, C.F.R., Sec. 26.04 (b): Each person who is required to maintain a listening watch under Sec. 1204 of the Act shall, when necessary, transmit and confirm, on the designated frequency, the intentions of his vessel and any other information necessary for the safe navigation of vessels.

T. 47, C.F.R., Sec. 83.251 (a): Notwithstanding Sec. 83.178, vessels, dredges, and floating plants subject to the Vessel Bridge-to-Bridge Radiotelephone Act transmitting on the designated navigational frequency shall initiate communications on the frequency in a format similar to those given below: . . .

(b) Vessels acknowledging receipt shall answer "(Name of vessel calling). This is (Name of vessel answering). Received your call" and follow with an indication of their intentions. Communications shall terminate when each ship is satisfied that the other no longer poses a threat to its safety and is ended with "out".

Rule 26 (b) (1), of the Federal Rules of Civil Procedure: the rule of civil procedure governing discovery, generally:

(b) Scope of Discovery. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

STATE OF ALABAMA)

COUNTY OF MOBILE)

AFFIDAVIT

My name is John A. Unzicker and I am a Mobile Bar Pilot. I have been a Mobile Bar Pilot for over 27 years.

By reason of my work as a Bar Pilot, I am familiar with the dredged channel in Mobile Bay. From my experience, I have become aware that both deep draft and light draft vessels will be caused to sheer if they approach too closely to either bank of the channel. I have experienced this situation on several occasions, in different parts of the channel. Also, I have observed other vessels taking a sheer.

It is because of the pilot's awareness of this situation that our ordinary practice, in piloting a ship in or out of the Mobile Bay dredged channel, to maintain the vessel we are piloting in the center of the channel; and, when approaching another vessel for passing, to move off to our own starboard only a distance sufficient to allow reasonable space for passing a short time before the passing occurs. This is to prevent the vessel getting too close to the bank.

There is no difference in any part of the channel, or either bank, with regard to this sheering effect. I am not aware of any pilot in the Mobile Bar Pilot Association who has not experienced a sheer in the Mobile Ship Channel.

/s/ JOHN A. UNZICKER

Subscribed and sworn to before me this 24 day of June, 1974.

/s/ PRESTON J. ALBERT
My Commission
Expires 6-14-77

Supreme Court, U. S.
FILED
SEP 7 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-168

Termar Navigation Company, Inc., As Managing Owner of the SERAFIN TOPIC,

Petitioner,

versus

SS POLANICA, and against POLSKIE LINIE OCEANICZNE, as Owner of the SS POLANICA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976

No. 76-168

Termar Navigation Company, Inc., As Managing Owner of the SERAFIN TOPIC,
Petitioner,

versus

SS POLANICA, and against POLSKIE LINIE OCEANICZNE, as Owner of the SS POLANICA,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

QUESTIONS PRESENTED

The basic and fundamental question to be considered is whether or not this Honorable Court should grant a writ of certiorari to review the decision of the Fifth Circuit Court of Appeals on an interlocutory admiralty appeal wherein that Court held:

> "We have thoroughly reviewed and carefully considered the record and the contentions of

> the parties in their briefs and at oral argument, and *we conclude that the court's findings are supported by the evidence and not clearly erroneous, and that its conclusions are correct.*" (page 27a, Petition) (Emphasis supplied)

We respectfully submit the writ should be denied since such a review is clearly not anticipated under Rule 19(b) of this Honorable Court.

Petitioner's Brief misstates the nature of the legal issue, or issues, sought to be reviewed. The Trial Court entered extensive Findings of Fact and Conclusions of Law holding, inter alia, that the sole *fault* of the collision was Petitioner's negligence and that Respondent and those aboard her were not guilty of *any fault* which proximately caused or contributed to the collision. On review, the Fifth Circuit Court of Appeals held that the Findings of Fact and Conclusions of Law were supported by the evidence and not clearly erroneous, and that the Conclusions of the Trial Court were correct.

Petitioner has never contended that the findings of the Trial Court were not supported by credible evidence and has never argued that the findings were clearly erroneous. Indeed, Petitioner does not now assert that the Findings of Fact were clearly erroneous nor does it now assert that the Fifth Circuit Court of Appeals erred in applying the criteria set forth in Rule 52(a) of the F.R.Civ.P.

Under these circumstances, should this Honorable Court review the holding of the Fifth Circuit Court of

Appeals that the Trial Court's Findings of Fact were supported by the evidence and were not clearly erroneous? We respectfully submit the Court should not.

An examination of Petitioner's questions (a-d, pages 4 and 5 of Petition) reveals that it seeks only to have this Court determine *de novo* the *fault* of the parties. The Petitioner totally disregards the decisions of the Fifth Circuit Court of Appeals as set forth in its decision holding specifically that the finding of fault in a collision case is primarily a fact issue to which the clearly erroneous rule applies. *Movible Offshore, Inc. v. M/V Wilken A. Falgout*, 471 F.2d 268, 272-73 (5th Cir. 1973); *A/R Seljan v. Pioneer Leasing Corp.*, 406 F.2d 768, 769 (5th Cir. 1969). (page 27a, Petition)

The factual issue of fault can only be gleaned from the total record which, in fact, was carefully reviewed by the Fifth Circuit Court of Appeals which concluded:

> "The evidence presented to the court during the thirteen-day trial was extensive, and included depositions, oral testimony from a number of witnesses, and over 200 exhibits. The facts were, and are, hotly disputed at virtually every conceivable point. The district court entered extensive findings of fact and conclusions of law. Essentially, the court held that the collision was proximately caused by the SERAFIN TOPIC's negligence in allowing herself to drift westward into the path of the POLANICA and failing to straighten up and come ahead sufficiently to allow the

POLANICA to pass safely; and that neither the POLANICA nor those aboard her were guilty of any fault that proximately caused or contributed to the collision. The SERAFIN TOPIC's theory, rejected below, is basically that she was on her own (east) side of the channel, and that the collision occurred when the POLANICA suddenly sheered to port." (page 26a, Petition)

The extensive Findings of Fact and Conclusions of Law of the Trial Court are set forth in their entirety in the Appendix to the Petition at pages 1a through 22a, which Respondent adopts as part of her Statement of the Case. Petitioner does not here, nor did it below, attack the Findings of Fact as clearly erroneous, and urges this Court to ignore the well-established rule that it will not substitute its own assessment of the disputed facts for the considered judgment of the Trial Judge who heard all of the testimony, observed the demeanor of the witnesses and made the necessary credibility choices. *McAllister v. United States*, 348 U.S. 19, 75 S.Ct. 6, 99 L. Ed. 20 (1954) and *Chaney v. City of Galveston*, (5th Cir. 1966) 368 F.2d 774, 776.

STATEMENT OF FACTS AND OF THE CASE

The recitation of facts contained in the "Questions Presented" (pages 2-5 of the Petition) and in the "Statement of Case" (pages 7-14 of the Petition) were prepared in disregard of the applicable principles of review that the evidence is to be viewed and construed favorably to the prevailing party below, and all

reasonable inferences of which the evidence is fairly susceptible should be drawn in support of, and not against, the judgment rendered below.

Petitioner's recitation of facts is not a fair statement of the facts and constitutes nothing more than selective editing and presenting those facts which Petitioner deems most favorable to its case, completely ignoring substantial evidence to the contrary presented by the POLANICA which clearly supports the Trial Court's findings. The thrust of the Petition is that this Court should make *de novo* findings of fault without presenting to this Court even a brief summary of the 1900 pages of testimony heard by the Trial Judge and reviewed by the Fifth Circuit Court of Appeals. Petitioner recites isolated segments of selected testimony, but fails to acknowledge that there was substantial conflicting testimony. It premises its arguments on "facts" and "theories" treating the same as uncontroverted, but fails to acknowledge or inform this Honorable Court that such were rejected by the Trial Judge. It fails here as it did in the Fifth Circuit Court of Appeals even to argue that the Findings of Fact are not supported by credible evidence. In essence, Petitioner requests this Court to reject Rule 52(a), and completely ignore the function of this Court in granting writs of certiorari within the purview of Rule 19.

Illustrative of the selective editing and misstatement of the facts is Petitioner's statement on page 4 of the Petition:

"She (POLANICA) did not, by radio, advise of her hard starboard rudder order or of her full astern, drop both anchors orders."

This completely ignores the testimony of the pilot of the POLANICA, who stated that he advised the pilot of the SERAFIN TOPIC by radio of those specific facts prior to the collision. (TR 919) The pilot of the SERAFIN TOPIC (Petitioner) at two points in his direct testimony (TR 97-98) maintained that he did not learn this information until after the collision. However, on cross-examination he admitted that he did have the radio conversation with the POLANICA's pilot prior to the collision, but hedged as to what was said. (TR 191) The testimony of the pilot of the POLANICA clearly indicates that the conversation occurred at the time that the POLANICA was letting the anchors go, which followed instantaneously the hard starboard and full astern orders. It is apparent that there was a direct conflict between the two pilots as to not only when the conversation in fact took place, but also as to what was said. It was the duty of the Trial Court to reconcile the testimony and to judge the credibility of the witnesses. The Trial Judge obviously rejected the testimony advanced by Petitioner.

Petitioner's position here is obscure and contradictory for at trial it insisted that up to thirty (30) seconds prior to collision both vessels were in perfect passing position with each well on their respective side of the channel when the Respondent suddenly sheered to port, crossed the channel, and caused the collision; yet now Petitioner abandons that theory. At trial Petitioner repeatedly insisted the wind had no effect on it, yet now admits the Petitioner did drift into the

path of Respondent because of the effect of the wind (page 21, Petition). Petitioner insisted at trial that Respondent should have come past the dredge at full ahead speed yet now asserts that Respondent should have slowed to less than five (5) miles per hour when passing the dredge. (page 21, Petition)

The Trial Court was aware of the wind force, its direction and effect on the maneuverability of Petitioner's vessel and rejected the testimony of Petitioner that the same had no effect on its vessel; the Court was aware of Petitioner's insistence that the Respondent sheered yet observed the strenuous objection of Petitioner to the introduction of testimony by Respondent regarding the physical configuration of the channel bottom and sides at the place of the collision, facts essential to a proper understanding of the physical forces required for sheering; the Trial Court heard and evaluated the dove-tailed testimony and selective recall of Petitioner's witnesses of events immediately preceding the collision as to minute details concerning helm orders, engine orders, and even the ability to recall various orders to the exact degree and the exact minute, yet the total failure of the same witnesses to recall other orders, events and maneuvers which were given under less stressful conditions. Furthermore, Petitioner ignores all of the damaging testimony elicited at trial as to the effect of propeller wash on her maneuverability, the fact that her engine was stopped for five minutes prior to the collision, the substantial testimony that the pilot of Petitioner's vessel waited too long to commence her passing maneuvers (TR 149, 1828) while at the same time repeatedly requesting the POLANICA to hurry

up and come ahead. (See also Finding of Fact #13, page 7a, Petition.) This Finding of Fact has not been attacked as clearly erroneous.

Petitioner and Respondent presented in the Trial Court totally different versions as to how the collision occurred. Virtually every conceivable issue was disputed in the thirteen-day trial in which many witnesses were heard ore tenus by the Trial Court. During the testimony presented ore tenus on behalf of both parties, liberal use was made of ship models, charts and the courtroom blackboard to illustrate positions and movements of the vessels in relation to each other, the dredge, the bouys and beacons in the channel at virtually every minute prior to, at the time of and subsequent to the collision. During that time the Court observed the demeanor of the witnesses on direct and cross-examination necessarily making credibility choices on virtually every factual issue. As the Fifth Circuit Court of Appeals recognized in its decision: ". . . Virtually every finding here required credibility choices by the trial judge . . ." (page 27a, Petition). It is obvious therefore, that the Trial Court entered its extensive Findings of Fact and Conclusions of Law based on the totality of facts elicited at the trial contained in the 1900 pages of testimony. The Trial Judge was obviously in the best position to make the factual determinations required in this case. It is precisely for this reason that the applicable principle of review exists that the evidence is to be viewed and construed favorably to the prevailing party below and that all reasonable inferences of which the evidence is fairly susceptible should be drawn in support of, and not against, the judgment rendered below. Rule 52(a) F.R.Civ.P. is but the codification of that principle.

REASONS FOR NOT GRANTING WRIT

Petitioner now seeks to have this Court issue a writ of certiorari to the Fifth Circuit Court of Appeals and as reasons therefor states on page 16 of the Petition that the Fifth Circuit Court of Appeals:

I. "has decided a federal question in a way in conflict with the applicable decisions of this Honorable Court" and

II. "has sanctioned, by the District Court such a departure from the accepted and usual course of judicial proceedings, as to call on this Honorable Court to exercise its power of supervision." and

III. has asked for a determination as to the purpose of the Vessel Bridge-to-Bridge Radiotelephone Act, 33 U.S.C., Sec. 1201, et seq., and its implementing regulations.

Petitioner has in no way complied with Rule 23(h) requiring a "direct and concise argument amplifying the reasons relied on for the allowance of the writ."

Although Petitioner alleges in Rule 19 terminology on page 16 of its Petition that the Court of Appeals decided a federal question in a way in conflict with the applicable decisions of this Court, Petitioner does not identify the federal question, neither does it show how the Findings of Fact were decided in a way in conflict with the applicable decisions, nor does it identify the

"applicable decisions." Petitioner is unable to do so because the Fifth Circuit Court of Appeals in its decision expressly recognized and followed the applicable rules and pertinent decisions of this Court when it stated:

> "Our review of fact findings is governed by the dictates of Rule 52(a), F.R.Civ.P., which provides in part: 'Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.' " (page 26a and 27a of Petition)

Petitioner does not amplify its reasons for requesting the writ except to the extent that the questions set forth on pages 4 and 5 of the Petition constitute the amplification of the reasons for granting the writ. An examination of these questions shows that there are no issues which are properly before this Court.

ARGUMENT

A. Questions Relating To Issues Of Fault.

Petitioner's arguments labeled "Statutory Violations" (page 17, Petition) and "Bridge to Bridge Radiotelephone Act" (page 22, Petition) are nothing less than an effort to have this Court decide, *de novo*, the factual question of fault. This is confirmed by an examination of the questions a-d raised at pages 4 and 5 of the Petition. The Fifth Circuit Court of Appeals has consistently held and so stated in its decision below, that a finding of fault in a collision case

primarily is a factual issue to which the clearly erroneous rule applies (page 27a, Petition).

In spite of Petitioner's contentions to the contrary, the Trial Court specifically found that the POLANICA and those aboard her were not guilty of *any* fault (statutory or otherwise) which proximately caused or contributed to the collision (page 22, Petition) and specifically found that Petitioner was at *sole* fault in causing the collision (page 17a, Petition). The Fifth Circuit Court of Appeals, after thoroughly reviewing the record and the contentions of the parties in their Briefs and at oral argument, concluded that the Trial Court's findings of fault were supported by the evidence, were not clearly erroneous and that its conclusions were correct. (page 27a, Petition)

Petitioner did not attack the Findings of Fact as being clearly erroneous in the proceedings before the Fifth Circuit Court of Appeals, nor does it allege in its Petition here that these Findings are clearly erroneous. Petitioner does not attack the applicable decisions of the Fifth Circuit that findings of fault in a collision case are primarily a factual issue.

It therefore, follows that these findings of fault are binding on this Court and necessarily preclude any consideration of the matter set out in questions a-d in the Petition.

In addition to being inextricably wrapped up in a factual determination of fault, the questions relating to the purported statutory violations do not hold up in light of the facts elicited at trial and found by the Trial Court. In support of the Trial Court's finding that

neither Respondent nor anyone on board her were guilty of any fault which proximately caused or contributed to the collision, which finding necessarily encompasses consideration of statutory violations, we must consider that the Trial Court found specifically that there was no question that the vessels would pass other than port-to-port as agreed, that such agreement was proper, and that the vessels at all times understood and intended to carry out that agreement (see Finding #27, page 22a, Petition) and that the pilot of the Respondent reasonably anticipated that Petitioner would clear the west side of the channel (Respondent's side) and return to her own side, *The Victory and The Plymothian*, 168 U.S. 410, 18 S.Ct. 149, 42 L.Ed. 519 (1897), and that Petitioner would comply with its agreement. *Lake Erie Trans. Co. v. Gilchrist Trans. Co.*, (6th Cir. 1906) 142 F. 89. This is particularly true in this case since Petitioner repeatedly urged Respondent to hurry up and come on by. That all questions of alleged statutory fault on the part of Respondent are totally without merit is evident upon a reading of Findings of Fact #15 and #16 of the Trial Court (page 9a and 10a, Petition) which were not attacked by Petitioner in the Fifth Circuit Court of Appeals as being clearly erroneous and which were found by the Fifth Circuit Court of Appeals to be supported by the evidence. These Findings which have not been questioned in this Court are as follows:

> "15. Until 2 minutes prior to the collision the engines of the SERAFIN TOPIC had been stopped for 6 minutes, according to her bridge bell book. She then put her engines on dead slow ahead for 1 minute, at which time the Captain of the SERAFIN TOPIC estimated her

speed at 3 knots. It is further undisputed that the wind, which was blowing East-Southeast and against the starboard side of the SERAFIN TOPIC tended to push the SERAFIN TOPIC toward the Western bank and into the path of the POLANICA. A review of the testimony offered through witnesses and the bridge bell book of the SERAFIN TOPIC reflects that the SERAFIN TOPIC was very much concerned about the passing taking place too close to the dredge and through her own witnesses stated that she did not want to get too far over to the east side. In fact, the pilot of the SERAFIN TOPIC testified that he was concerned whether he was crowding the POLANICA. This was notwithstanding the request by the pilot of the POLANICA for the SERAFIN TOPIC to straighten up and come ahead when the POLANICA passed the dredge. Instead, the SERAFIN TOPIC continued to kill time and attempted to delay her forward progress so that the meeting would take place as far south of the dredge as possible. Although this was a head to head meeting, the pilot of the SERAFIN TOPIC stated that he did not intend to come ahead and straighten out his vessel until the bow of the POLANICA had passed the bow of the SERAFIN TOPIC. Less than 30 seconds before the collision, the SERAFIN TOPIC executed a full ahead and a hard starboard simultaneously. This maneuver caused the stern of the SERAFIN TOPIC to swing further to the west and further in front of the path of the POLANICA.

"16. It was immediately apparent that the SERAFIN TOPIC did not intend nor had she commenced her passing maneuver when the vessels were 200-300 feet apart. Only when collision seemed inevitable did the SERAFIN TOPIC take any action to straighten out or come ahead. The action ultimately taken by the SERAFIN TOPIC aggravated rather than alleviated the situation."

It must also be emphasized that SERAFIN TOPIC (Petitioner), while losing her maneuverability as set forth hereinabove nevertheless kept requesting POLANICA (Respondent) to hurry on by, as the SERAFIN TOPIC, the Petitioner, was about to blow ashore. (Finding of Fact #13, page 7a, Petition) If Petitioner was unable to comply with the agreement for a port-to-port passing, such knowledge was in the sole province of the Petitioner and the burden to communicate this inability to comply lay with Petitioner, not Respondent. *The Victory and The Plymothian*, supra; *Lake Erie Trans. Co. v. Gilchrist Trans. Co.*, supra.

B. Bridge-to-Bridge Radiotelephone Act — Petitioner's Question C

Question c (page 5, Petition) relating to the Vessel Bridge-to-Bridge Radiotelephone Act, when considered in the light of the facts found by the Trial Court that the vessels were in constant radio communication by means of sophisticated walkie-talkies customarily used by the Mobile Bar Pilots, the excellent and almost unlimited visibility prior to and at

the time of the collision, the findings that there was never any doubt that a port-to-port passing was intended, and that such a passing agreement was proper, make the act wholly inapplicable under the facts in the case. Further, the Act specifically provides in Section 1204 (page 31a, Petition):

". . . Nothing contained herein shall be interpreted as precluding the use of portable radiotelephone equipment to satisfy the requirements of this chapter."

Petitioner's argument here again illustrates its refusal to recognize that there was conflicting testimony in the Trial Court and that there was substantial testimony offered by the POLANICA that a radio conversation in fact took place between the two pilots simultaneously with the letting go of anchors prior to the collision. (TR 919) Petitioner refuses to recognize that the Trial Court accepted the testimony offered by Respondent and rejected the testimony offered by Petitioner on the question of whether or not a radio conversation took place, when such conversation took place, and the substance of the conversation. As the Fifth Circuit pointed out in its decision:

"The facts were, and are, hotly disputed at virtually every conceivable point. . . . Virtually every finding here required credibility choices by the trial judge . . ." (pages 26a and 27a of Petition)

C. Right Of Discovery

Question e at page 5 of the Petition is impertinent for the Trial Court did not deny Petitioner the right of dis-

covery and for Petitioner to so imply is grossly misleading. The Trial Court simply stated that inquiries into acts which allegedly occurred in 1961 and 1962, some twelve years prior to the collision, were too far removed in point of time from the facts alleged in the pleadings. Petitioner did not undertake any subsequent discovery, nor did it allege or show in its Petition how this was an abuse of the Trial Court's discretion. It is well recognized that the Trial Court has the authority to limit discovery to pertinent times in the past and this decision will not be reversed unless there is an abuse in discretion which results in substantial prejudice. *M.S.A. Const. Co., Inc. v. Crafts, Inc.*, (E.D. Wisc. 1973), 58 F.R.D. 215; *Huff v. N.C. Cass Co. of America*, (5th Cir. 1972) 468 F.2d 176; *Baker v. F & F Inv.*, (2nd Cir. 1972) 470 F.2d 778, cert. denied 93 S.Ct. 2147, 411 U.S. 966, 36 L.Ed. 2d 686. Not only has Petitioner failed to allege or show an abuse of discretion, but it has chosen both in the proceedings before the Fifth Circuit Court of Appeals and in the Petition herein to completely ignore the Findings of Fact by the Trial Court as set forth in Finding of Fact #22 (pages 13a and 14a, Petition), which Petitioner has never attacked as clearly erroneous, to the effect that the POLANICA had no steering gear malfunction on the night of the collision, nor was there any evidence to indicate any momentary malfunction.

On page 14 of the Petition under "Interrogatories" Petitioner refers to a test of the steering gear on the POLANICA following the collision by competent surveyors who *found nothing wrong*. What Petitioner fails to mention is that the two surveyors who conducted tests on the Respondent's steering gear were engaged by Petitioner, neither of whom was

called to testify by Petitioner. Finding of Fact #22 (page 13a, Petition) contains a full discussion of the pertinent facts as found by the Trial Court which is set out in its entirety, viz:

> "22. The Court finds that the POLANICA had no steering gear malfunction on the night of the collision nor was there any evidence to indicate any momentary malfunction. The steering mechanism on the POLANICA was powered by two hydraulic pumps powered by two electric motors. The POLANICA carried two separate electrical steering systems. The POLANICA, at the time of the collision, was operating on both pumps and motors, since it was customary while maneuvering to use both, while at sea she used only one pump and motor. Although the SERAFIN TOPIC engaged two marine surveyors who conducted unrestricted surveys on the POLANICA's steering apparatus on two separate occasions, one only two days after the collision, neither of these experts was called by the SERAFIN TOPIC. On the other hand, the POLANICA introduced the expert testimony of John N. van Aken, the marine surveyor who attended both surveys conducted by surveyors on behalf of the SERAFIN TOPIC and who testified that both tests were satisfactory and disclosed no malfunction nor defects. He further testified that in his expert opinion, the POLANICA had no steering gear malfunction or difficulty on the night of the collision. In addition, those on the bridge of the

POLANICA testified that they observed no steering malfunction prior to or after the collision, and that none of the warning systems, (red light and buzzer) on board the POLANICA designed to alert the bridge and engine room against such malfunctions sounded. The Captain of the POLANICA also testified that the steering gear had been checked in February 1973, during routine dry docking. Her Chief Engineer testified by deposition that no repairs or adjustments were made to the steering mechanisms between the time of the collision and its subsequent surveys. The Court therefore finds that the steering gear mechanism on board the POLANICA was in proper working order at the time of the collision."

It is significant to note that Petitioner did not attack Finding of Fact #22 as clearly erroneous in the Court below, nor does it now assert that such finding was not supported by the credible evidence.

D. Affidavits

Question f on page 5 of the Petition is not properly before this Court. Petitioner neither assigned nor argued before the Fifth Circuit Court of Appeals that the Trial Court erred in striking the Affidavits submitted with Petitioner's Motion for New Trial. There is therefore no basis for this Court to consider this question. *Duignan v. United States*, 274 U.S. 195, 71 L.Ed. (1927); *Lawn v. United States*, 355 U.S. 339, 2 L.Ed. 2d 321 (1958). It should be pointed out that it was not until after a decision was rendered by the Trial Court that

Petitioner sought to put before the Trial Court in Affidavit form additional cumulative evidence regarding sheering. Both parties had presented substantial evidence on sheering at the Trial Court level. (See Finding of Fact #25, page 15a, Petition.) In view of Finding of Fact #25 which has not been attacked by Petitioner as being clearly erroneous, there has been no showing that the ruling of the Trial Court striking the Affidavits resulted in, or even could have resulted in any prejudice to Petitioner. The Petition is absolutely devoid of any showing as to why the Trial Court allegedly committed error in striking the Affidavits. The six-line argument made by Petitioner on page 24 of its Petition clearly fails to comply with the requirements as set forth in Rule 23(4) of this Honorable Court and presents nothing for review.

CONCLUSION

It is respectfully submitted that Petitioner has failed to sustain its burden under Rule 19 to demonstrate that there are special and important reasons why the writ should be granted. The Fifth Circuit Court of Appeals did not decide "a federal question in a way in conflict with applicable decisions of this Honorable Court" nor has it "sanctioned by the District Court such a departure from the accepted and usual course of judicial proceedings, as to call on this Honorable Court to exercise its power of supervision." In spite of Petitioner's Rule 19 terminology to the contrary, the question below was purely and simply was there sufficient evidence to support the Findings of Fact and Conclusions of Law of the Trial Court. The Fifth Circuit Court of Appeals after a thorough review of the

record and extensive briefs, including hearing counsel at oral argument, concluded that the Trial Court's findings are not clearly erroneous, and that its conclusions are correct.

We submit the Petition should be denied.

Respectfully submitted,

JOSEPH M. ALLEN, JR.
Attorney for S/S POLANICA

CERTIFICATE OF SERVICE

I certify that three copies of the foregoing Respondent's Brief in Opposition to Petition for Writ of Certiorari have been served on John H. Tappan, Esquire, on the ____ day of September, 1976, by United States Mail, postage prepaid, at his mailing address, Post Office Box 8158, Mobile, Alabama, 36608.

JOSEPH M. ALLEN, JR.